

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

NOV - 7 2007

COURT OF APPEALS  
DIVISION TWO

DORA C.,

Appellant,

v.

ARIZONA DEPARTMENT OF  
ECONOMIC SECURITY, MIRIAM J.,  
and ARMANDO J., JR.,

Appellees.

2 CA-JV 2007-0065  
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD20060003

Honorable Joseph R. Georgini, Judge

AFFIRMED

Richard Scherb

Florence  
Attorney for Appellant

Terry Goddard, Arizona Attorney General  
By Dawn R. Williams

Tucson  
Attorneys for Appellee Arizona  
Department of Economic Security

V Á S Q U E Z, Judge.

¶1 Dora C. appeals from the juvenile court's order of August 6, 2007, terminating her parental rights to her children, Miriam J. and Armando J., Jr. In the single issue raised on appeal, Dora contends the juvenile court abused its discretion by ordering her rights

terminated in her absence after she failed to appear in person at the initial termination hearing.

¶2 The Child Protective Services (CPS) division of the Arizona Department of Economic Security (ADES) took Miriam and Armando Jr. into protective custody in January 2006 after receiving a report that the parents were using and selling drugs. A subsequent investigation led to the discovery of methamphetamine and drug paraphernalia in the family home. The children were adjudicated dependent the same month based on Dora's acknowledgment that she was "willing but unable" to parent—in effect, an admission to the allegations in the dependency petition. At the initial dependency hearing, the juvenile court admonished Dora that "her failure to attend future hearings without good cause . . . could result in a finding she has waived her legal rights and the hearing [could] go forward in her absence."

¶3 The initial case plan goal called for reunification of the family. Toward that end, Dora was offered assorted therapeutic services, including a psychological evaluation, individual counseling, parenting classes, random urinalysis, and substance abuse treatment. However, the CPS case manager later testified at the initial severance hearing in June 2007 that "both parents have not participated in any services besides supervised visitation. Mom has never followed through with anything. Both have . . . a pretty long history of using illegal substances, and both have been incarcerated and deported, [although] I know they're both back in this area as we speak . . . ."

¶4 Based presumably on the parents' lack of participation in their case plans, at a combined dependency review and permanency planning hearing on January 17, 2007, the juvenile court changed the case plan goal to severance and adoption. Dora was not present but was represented by counsel at that hearing.

¶5 On March 5, 2007, ADES filed both a motion to terminate parental rights and a notice that the initial termination hearing would be held on April 9. In conformity with Rule 64(C), Ariz. R. P. Juv. Ct., the notice warned the parents that the juvenile court could treat their failure to appear at the hearing without good cause as a waiver of their rights and an admission of the allegations in the motion. The notice further warned that the court could potentially proceed to terminate their parental rights in absentia "based upon the record and evidence presented." Ariz. R. P. Juv. Ct. 64(C). ADES served the motion and notice of hearing on Dora by mailing it to her attorney of record and by serving the clerk of the court. *See generally Mara M. v. Ariz. Dep't of Econ. Sec.*, 201 Ariz. 503, ¶ 22, 38 P.3d 41, 45 (App. 2002) (motion to terminate may be served on parent's counsel and need not be served on parent personally). Pursuant to Rule 5(c)(2)(D), Ariz. R. Civ. P., service on the court clerk is an appropriate means of effecting service on a person whose address is unknown.

¶6 For reasons not apparent in the record, neither Dora nor her counsel appeared on April 9 for the initial severance hearing. At the request of the father's counsel and over the objection of ADES, the juvenile court ordered the initial severance hearing continued until June 11. On that date, when again neither parent personally appeared, the court

proceeded in their absence, finding they had “voluntarily absented themselves” from the hearing. The record does not reflect that Dora’s counsel objected to the procedure at any point. After hearing testimony from the CPS case manager, the court found the state had established the three statutory grounds alleged in the motion for terminating Dora’s rights and further found termination was in the children’s best interests.

¶7 On July 2, after ADES had prepared and lodged a formal judgment, Dora’s counsel filed a written objection to two of the proposed findings of fact it contained. The objection pertinent here stated:

1. The mother objects to . . . requested Finding #10. The mother admits she was admonished as claimed by the Attorney General regarding the consequences of her failure to appear for Court proceedings. However, the mother was not present in Court on June 11, 2007 due to her incarceration due to immigration charges. She was unable to contact counsel at that time and was later released and informed counsel of her incarceration. She contends that she did not willfully fail to attend the Severance Proceedings on June 11, 2007.

On July 20, the children’s father filed a motion to set aside the entry of his default, claiming he had been deported to Mexico following his release from incarceration in Arizona. He argued that he had thus been “prevented” by state and federal officers from attending the hearing on June 11 and that his failure to appear was not volitional.

¶8 On August 6, the juvenile court held a hearing on Dora’s objection to the proposed form of judgment and on the father’s motion to set aside his default. The record before us does not contain a transcript of that hearing, but the court’s minute entry states that discussions were held “as to [the] dates when the parties were incarcerated” and that

both Dora and the father were present and testified at the hearing. The minute entry then states: “The Court is satisfied that neither parent has shown good cause for failing to appear for the June 11, 2007 hearing; therefore, Findings of Fact [and] Conclusion[s] of Law are signed this date.” The court also denied the father’s motion to set aside his default.

¶9 On appeal, Dora does not claim she was improperly served or lacked actual notice of the initial termination hearing before it was held on June 11. She does not deny having been warned or knowing that her failure to attend the hearing could result in the court’s proceeding in her absence to terminate her rights. Nor does she challenge the court’s subsequent determination that she failed to show good cause for her nonappearance on June 11. Rather, her contention is a broader, more general claim that the procedure specified in Rule 65(C)(6)(c), Ariz. R. P. Juv. Ct.,<sup>1</sup> and utilized in this case denies an absent parent “the opportunity to be heard in a meaningful time [and] in a meaningful manner.” As a result, she claims, the procedure authorized by the rule potentially deprives a parent of the fundamental right to the care and custody of his or her children without due process of law.

¶10 Rule 36, Ariz. R. P. Juv. Ct., instructs that the rules of procedure governing dependency and termination proceedings “should be interpreted . . . to protect the best interests of the child, giving paramount consideration to the health and safety of the child.”

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<sup>1</sup>Although the rule Dora cites in her argument is Rule 64(C), Ariz. R. P. Juv. Ct., that rule dictates only the content required in the notice of hearing that must accompany a motion or petition for termination of parental rights. The substance of her argument, however, challenges the “default” procedure authorized by A.R.S. § 8-863(C) and Rules 65(C)(6)(c) and 66(D)(2), Ariz. R. P. Juv. Ct. Although Dora has not cited those provisions, we assume that she intended to do so. Therefore, in the exercise of our discretion, we address them.

And parental rights, while fundamental, “are not absolute.” *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 24, 110 P.3d 1013, 1018 (2005). They may be terminated “under certain circumstances,” provided the procedures employed are fair and satisfy due process. *Id.*

¶11 As the state correctly notes, the essence of due process is reasonable notice and an opportunity to be heard. *J.D.S. v. Franks*, 182 Ariz. 81, 95, 893 P.2d 732, 746 (1995); *In re Maricopa County Juvenile Action No. JS-501904*, 180 Ariz. 348, 355, 884 P.2d 234, 241 (App. 1994); *In re Pima County Juvenile Action No. S-949*, 131 Ariz. 100, 101, 638 P.2d 1346, 1347 (App. 1981). Both Rule 65(C)(6)(c) and the applicable statute, A.R.S. § 8-863, clearly afford a parent the right to notice and an opportunity to be heard before the parent’s rights may be terminated. The procedure specified by the rule therefore satisfies due process. That Dora failed to avail herself of the opportunity to appear and be heard, or was unable to show good cause for her failure to do so, does not render the procedure itself unconstitutional. Dora effectively concedes having had notice of the hearing and actual knowledge of the possible consequences of failing to appear. Under these circumstances, she was not denied due process of law.

¶12 As we understand Dora’s argument, she implies that a parent’s rights should never be terminated in the parent’s absence, regardless of the circumstances. We cannot agree with such a proposition, not least because a parent could thereby permanently escape the attempted termination of his or her parental rights simply by never appearing in court—an obviously absurd result when the competing interests of a dependent child hang in the balance. *See generally Adrian E. v. Ariz. Dep’t of Econ. Sec.*, 215 Ariz. 96, ¶ 12,

158 P.3d 225, 229 (App. 2007) (default termination of parental rights “implicitly authorize[d]” by Rule 64(C) when parent fails to attend status conference without good cause); *Kelly R. v. Ariz. Dep’t of Econ. Sec.*, 213 Ariz. 17, 137 P.3d 973 (App. 2006) (mother’s parental rights permissibly terminated when she failed to attend pretrial conference); *In re Maricopa County Juvenile Action No. JS-5860*, 169 Ariz. 288, 290-91, 818 P.2d 723, 725-26 (App. 1991) (severance order set aside because mother not served with amended petition for termination asserting new claims as to additional children; lack of proper service denies party sufficient notice, fails to satisfy due process, and deprives court of jurisdiction).

¶13 We conclude that the procedures specified in § 8-863 and Rule 65(C)(6)(c) are fundamentally fair and afford parents in termination proceedings due process of law. Consequently, we reject Dora’s claim of unconstitutionality and find the juvenile court, having substantially followed those procedures, did not abuse its discretion in terminating Dora’s parental rights “based upon the record and evidence presented” at the initial termination hearing that Dora failed to attend “without good cause shown.” Ariz. R. P. Juv. Ct. 65(C)(6)(c).

¶14 Accordingly, we affirm the juvenile court’s order terminating Dora’s parental rights to Miriam and Armando Jr.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge